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Attorneys for Plaintiffs Paul Holman and Lucy Rivello

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**

13 _____
14 _____
15 **IN RE APPLE & AT&TM**
16 **ANTITRUST LITIGATION.**
17 _____

Case No: C 07-05152-JW

CORRECTED
REPLY MEMORANDUM OF LAW IN
SUPPORT OF MAX FOLKENFLIK AS
INTERIM LEAD COUNSEL

18
19 Plaintiffs Paul Holman and Lucy Rivello, by their counsel Folkenflik & McGerity and
20 Hoffman & Lazear, submit this Reply Memorandum of Law in support of the appointment of
21 Max Folkenflik as Interim Lead Counsel.

22 **POINT I**

23 **THE APPEARANCE OF FOLKENFLIK**
24 **& MCGERITY IN OTHER ACTIONS DOES NOT**
DISQUALIFY THEM FROM APPEARING HERE

25 Counsel in *Timothy P. Smith, et al. v. Apple, Inc., et al.* argues that the court must
26 address the question of whether Folkenflik & McGerity is disqualified from serving as counsel
27 here because the action in which it appeared in California amounts to being "regularly
28 engaged in the practice of law in the state of California" thereby allegedly requiring

1 disqualification under Local Civil Rule 11-3(b).¹

2 However, counsel for *Smith* ignores the plain language of the rule which provides that
3 *pro hac vice* status can be granted to an applicant if “authorized . . . by an order of the
4 assigned judge” which the application here was.

5 Further, as the Reply Declaration of Max Folkenflik demonstrates, the cases in which
6 Mr. Folkenflik appears in California are all Federal cases, other than one. In most, the cases
7 are pending in New York and were transferred to California for pre-trial purposes by the Multi-
8 District Litigation Panel. Mr. Folkenflik has conducted his practice of law in New York and has
9 only made limited appearance in California in any of those actions. He has appeared in
10 California in the *Hoffman* action, but that case alone, or even in combination with the Federal
11 cases, can hardly be considered the “regular[]. . . practice of law in California.”

12 We have found no case in any Federal court in which counsel was denied the right to
13 appear *pro hac vice* under such an approach and the application required by the rules does
14 not even require disclosure of those other actions. See Local Civil Rule 11-3(a). The realities
15 of current practice in the Federal courts, particularly in class actions, are that counsel often
16 practices nationally, with numbers of cases occurring in various jurisdictions. Counsel for
17 defendants, and other plaintiffs’ counsel are also engaged in multiple cases in California
18 Federal courts. Were the Court to adopt the rule urged by counsel for *Smith*, the ramifications
19 of such a ruling would go far beyond this case (where it may require disqualification of other
20 defense and plaintiffs’ counsel) and would disrupt practice in the Federal Courts.

21
22
23 ¹ Local Civil Rule 11-3(b) provides:

24 (b) Disqualification from *pro hac vice* appearance. Unless authorized by an Act of Congress
25 or by an order of the assigned judge, an applicant is not eligible for permission to practice *pro hac vice*
26 if the applicant: (i) resides in the State of California; or (ii) is regularly engaged in the practice of law
27 in the State of California. This disqualification shall not be applicable if the *pro hac vice* applicant (i)
28 has been a resident of California for less than one year; (ii) has registered with, and completed all
required applications for admission to, the State Bar of California; and (iii) has officially registered to
take or is awaiting his or her results from the California State Bar exam.

1 **POINT II**

2 **THE STIENER CASE DOES NOT**
3 **PRESENT A CONFLICT FOR COUNSEL**

4 Counsel for *Smith* asserts that counsel for *Holman* must be disqualified because of their
5 representation of Plaintiffs in a separate unrelated litigation, *Stiener et al. v. Apple, Inc., et al.*,
6 Index No. C07-04486 SBA. The basis of the claim is that counsel may be forced to divide time
7 between that case and this one, or that the defendants may make an offer in settlement in
8 *Stiener*, conditioned on a favorable deal in this action. See Smith Mem. in Opp. at 6. As to
9 the division of time, all counsel have more than one case to handle, and that is hardly a
10 ground for disqualification. As to the conditional settlement, it is impossible to imagine that
11 any such unethical offer would be made and certainly none would be accepted. "[C]ourts
12 sensibly hold that speculative conflicts of interest do not preclude a finding that class counsel
13 is adequate." *In re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 534, 541 (D. Va. 2006), *citing*,
14 *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 440 (E.D.Pa 1998) (holding that "merely
15 speculative and hypothetical" conflicts of class counsel will not bar class certification); *In re*
16 *Olsten Corp. Sec. Litig.*, 3 F.Supp.2d 286, 296 (E.D.N.Y. 1998) (same). As the court also
17 noted in *BearingPoint*, "[t]his is especially so, given the procedural protections afforded by
18 Rule 23's mandated judicial supervision of the class litigation and any proposed settlement."
19 *Id.*

20 Dated: March 25, 2008

21 **FOLKENFLIK & McGERITY**

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